

SOUTHERN ENVIRONMENTAL LAW CENTER

Telephone 843-720-5270

463 KING STREET, SUITE B
CHARLESTON, SC 29403-7204

Facsimile 843-414-7039

November 12, 2018

Mr. David Butler
Hearing Officer
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

Re: Responses to Outstanding Evidentiary Objections in Docket
Nos. 2017-207-E, 2017-305-E, and 2017-370-E

Dear Mr. Butler:

Pursuant to your e-mail on October 31, 2018 eliciting responses to evidentiary objections, Intervenor Coastal Conservation League (“CCL”) and Southern Alliance for Clean Energy (“SACE”) submit the following responses to the Joint Applicants’ objections to our exhibits.

As an initial matter, “[a]n administrative agency need not adhere to strict rules of evidence when acting in a judicial capacity,” so long as the substantial rights of the parties are preserved. *City of Spartanburg v. Parris*, 251 S.C. 187, 190, 161 S.E.2d 228, 229 (1968). This Commission should exercise its discretion to allow the exhibits in question to be entered into the record, and then weigh them as the Commission deems appropriate. *See Halbersberg v. Berry*, 302 S.C. 97, 104, 394 S.E.2d 7, 11 (Ct. App. 1990) (describing discretion of trial court to admit expert testimony).

Gregory M. Lander Exhibits

Objections: Relevance, Hearsay, Foundation, Authentication, Personal Knowledge

Responses:

Relevance (applicable to all exhibits in question). Mr. Lander’s testimony and his exhibits are directly relevant to this proceeding because Dominion and South Carolina Electric and Gas Company (“SCE&G”) have stated that Dominion plans to operate SCE&G in “substantially the same manner,” enhanced by Dominion’s “deep experience” in managing gas natural gas systems; that Dominion’s size will offer benefits to SCE&G customers; and that Dominion has a commitment to environmental sustainability and keeping costs low for customers. Joint Application at 16-22. Mr. Lander’s

testimony responds to these statements and provides relevant background information on Dominion for the Commission to evaluate whether the merger and proposed customer benefits plan are in customers' interests.

Commissions tasked with evaluating mergers regularly look at information to evaluate the proposed suitor's track record elsewhere. Therefore, it is expected that experts will supply Commissions with evidence about that utility's past practices. Witness Lane Kollen, for example, pointed to the merger savings associated with Dominion's prior acquisitions of East Ohio Gas and Hope Natural Gas, to make the case that the Commission should provide a rate reduction for merger savings. Mr. Lander has provided the Commission with pertinent information about Dominion's practices in Virginia.

In addition, affiliate transaction considerations are regularly part of merger proceedings. They were raised in the parallel North Carolina Commission proceeding, where they were addressed in a settlement, and are the subject of a proposed agreement with Transco in this proceeding. Information about South Carolina's current pipeline capacity and information about Dominion's history of building an unneeded, multi-billion dollar pipeline by signing contracts with affiliates are directly relevant to the question of whether affiliate transaction conditions should be imposed by this Commission.

Hearsay (applicable to all exhibits in question). The exhibits the Joint Applicants object to on hearsay grounds were not offered to prove the truth of the matter asserted, but as the basis for Mr. Lander's opinion. Furthermore, under Rule 703 of the South Carolina Rules of Evidence, experts may rely on facts and data which are not admitted in evidence or admissible when forming their opinions. *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 295, 529 S.E.2d 45, 50 (Ct. App. 2000) ("An expert witness may state an opinion based on facts not within his firsthand knowledge. . . . He may base his opinion on information, whether or not admissible, made available to him before the hearing if the information is of the type reasonably relied upon in the field to make opinions.") Experts may also testify about matters of hearsay "for the purpose of showing what information he relied on in giving his opinion of value." *Id.* The exhibits of Mr. Lander that the Joint Applicants objected to are of the type relied upon by experts in Mr. Lander's field and were relied upon by him in his testimony. The exhibits do not contain hearsay, but even if they did, they should be able to be entered into the record under Rule 703.

Foundation/Authentication – Assessment of South Carolina Natural Gas Pipeline Capacity. Mr. Lander is the author of the Assessment of South Carolina Natural Gas Pipeline report, which he was independently

commissioned to prepare outside of this proceeding. He laid a foundation for the report on page 6 of his testimony, where he explained what the report is and where it came from.

Rule 901(a), SCRE, requires that exhibits must be authenticated or identified before they may be admitted. This requirement is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims it to be. The burden to authenticate is “not high;” all that is required is a “satisfactory foundation from which the jury could reasonably find that the evidence is authentic.” *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014) (decided under Fed. R. Evid. 901(a)(3)); *see also Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015) (internal citation omitted); 29A Am. Jur. 2d Evidence § 1045 (2008) (“The authentication requirement does not demand that the proponent of . . . evidence conclusively demonstrate [its] genuineness . . .”). Mr. Lander drafted the exhibit in question, and his Company’s name is on page ii. SCRE 901(b)(4). There is clearly sufficient evidence to authenticate the report.

Hearsay – Prior Testimony. Mr. Lander’s testimony in the Virginia State Corporation Commission case GL-3 is demonstrative of opinions that Mr. Lander holds regarding utility resource planning and provide a basis for his opinion testimony in this case. *See In Re: Combined Application of S.C. Elec. & Gas Co. for A Certificate of Env’tl. Compatibility & Pub. Convenience & Necessity & for A Base Load Review Order for the Constr. & Operation of A Nuclear Facility in Jenkinsville, S.C.*, 2008-196-E, 2009 WL 9567422, at *61 (Feb. 27, 2009) (overruling hearsay objection). We note that Joint Applicant witnesses (e.g., Dr. Lynch) have attached as exhibits testimony from prior proceedings.

Foundation/Authentication – Prior Testimony. Mr. Lander identified what the prior testimony is and where it came from on page 8 of his direct testimony. The distinctive characteristics of the testimony, including its header, substance, and formatting are sufficient to authenticate the testimony, SCRE 901(b)(4), as is the fact that it is a public record, SCRE 901(b)(7).¹

Personal Knowledge/Foundation/Authentication – Dominion Discovery Response, Economic Impacts of the ACP Report. Mr. Lander identified what these documents are and where they came from on pages 8 and 9. Both documents bear distinctive characteristics, including formatting, branding, and in the case of the discovery response, a bates stamp and signature from a Virginia Electric and Power Company employee. SCRE 901(b)(7). The

¹ The testimony can be found on the Virginia State Corporation website at: <http://www.scc.virginia.gov/docketsearch/DOCS/3n5k01!.PDF>.

Economic Impacts Report is available online, where the distinctive features can be compared and confirmed. There is evidence sufficient to support a finding that these documents are what Mr. Lander claims them to be.

Binz Maryland Commission Order Exhibit

Objections: Relevance, Lack of Foundation, Lack of Authentication

Responses:

Relevance. The Maryland Order is relevant as an example of how Commissions can impose merger conditions. As Mr. Binz points out, “the decision is important because of the rigorous way the Maryland Commission grappled with the large number of issues raised by the merger proposal.” Binz Direct Testimony at 14. The Commission has a “duty to be aware of and keep informed of regulatory issues across the country,” and has looked to the decisions from other jurisdictions in previous proceedings. *Re S. Bell Tel. & Tel. Co.*, 132 P.U.R.4th 145, 1992 WL 486424, Docket No. 89-638-C, Order No. 92-170 (Mar. 16, 1992).

Foundation and Authentication. The facts surrounding the Maryland Order and Mr. Binz’s knowledge of the document provide reliable indicators that the document in question is what it is claimed to be. Further, the document has a variety of “distinctive characteristics,” including a particular header, signature, format, and content, that indicate it is the order. SCRE 901(b)(4). It is easy to find the same order by searching for it on the Maryland Public Service Commission website, and it qualifies as a public record.² SCRE 901(b)(7). Again, the standard for authentication is low. The Commission can reasonably infer that the document is what Mr. Binz claims it to be.

We ask that the Commission exercise its discretion to overrule the Joint Applicants’ objections and admit the exhibits of Mr. Lander and Mr. Binz, giving the exhibits the weight the Commission deems appropriate. The undersigned reserve the right to respond to any new arguments put forth by the Joint Applicants subsequent to this response. If we can provide any additional information, please do not hesitate to ask.

Sincerely,

/s/ William C. Cleveland

Counsel for CCL and SACE

² https://webapp.psc.state.md.us/newIntranet/Casenum/NewIndex3_VOpenFile.cfm?FilePath=C:\Casenum\9300-9399\9361\271.pdf.